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No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

CITY OF RICHMOND,

Appellant,

v.

J. A. CROSON COMPANY,

Appellee.

On Appeal from the United States Court of Appeals for the Fourth Circuit

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Whether a city, in order to remedy the virtual absence of minority participation in its city construction contracts caused by racial discrimination in its construction industry, may enact an ordinance that requires prime construction contractors to subcontract a portion of their city contracts to minority businesses.

2. Whether a city, in order to adopt a minority subcontracting requirement for city contracts, must admit or concede its own discrimination against minority contractors.

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JURISDICTIONAL STATEMENT

The City of Richmond, Virginia, appeals from the judgment of the United States Court of Appeals for the Fourth Circuit holding that the minority subcontracting requirement of a Richmond ordinance is unconstitutional as being violative of the equal protection clause of the fourteenth amendment.

OPINIONS BELOW

The opinion of the Fourth Circuit from which this appeal is taken is reported at 822 F.2d 1355 (4th Cir. 1987). It is reproduced as Appendix A in the Appendices attached to this Jurisdictional Statement. The or-

der of the Fourth Circuit denying the Petition for Rehearing with Suggestion for Rehearing En Banc is unreported and is reproduced as Appendix B. The earlier opinion of the Fourth Circuit, which was vacated by this Court, is reported at 779 F.2d 181 (4th Cir. 1985) and is reproduced as Appendix E in the Supplemental Appendices accompanying this Jurisdictional Statement. The decision of this Court granting certiorari, vacating the judgment of the Fourth Circuit, and remanding to the Fourth Circuit, is reported at 106 S. Ct. 3327 (1986) and is reproduced as Appendix D. The opinion of the district court is unreported and is reproduced as Appendix G in the Supplemental Appendices.

JURISDICTION

The judgment of the Fourth Circuit declaring the Richmond ordinance unconstitutional and remanding to the district court for determination of appropriate relief was issued on July 9, 1987 (App. A). A petition for rehearing with suggestion for rehearing en banc, filed on July 23, was denied on September 18, 1987, by a vote of 6-5 (App. B). A notice of appeal to this Court was filed with the Fourth Circuit on November 18, 1987 (App. C).

This appeal is being docketed within 90 days of the denial of rehearing below. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(2) (1982).

CONSTITUTIONAL PROVISION AND ORDINANCE INVOLVED

This appeal involves (1) the equal protection clause of the fourteenth amendment to the United States Constitution, which provides that no state shall "deny to any person within its jurisdiction the equal protection of the laws," and (2) the Richmond, Virginia Minority Business Utilization Plan, codified at Richmond, Va. Code ch. 24.1, art. I(F) (Part B) ¶ 27.10-27.20, art. VIII-A

(1983). The Minority Business Utilization Plan is reproduced as Appendix H in the Supplemental Appendices accompanying this Jurisdictional Statement.

STATEMENT OF THE CASE

The United States Congress and this Court have recognized that racial discrimination in the construction industry, and its impact on public contracting opportunities for minorities, is a problem of national proportions.[1] Like many other local governments across the country, the City of Richmond, Virginia, sought to remedy racial discrimination in its own local construction industry that had severely limited minority participation in its public construction contracts. It enacted a minority subcontracting plan for city construction contracts similar to the federal plan approved by this Court in *Fullilove v. Klutznick*, 448 U.S. 448 (1980). The Fourth Circuit, claiming reliance on *Wygant v. Jackson Board of Education*, 106 S. Ct. 1842 (1986), declared the Richmond plan unconstitutional.

A. The Minority Business Utilization Plan

In 1983, one-half of the population of Richmond was minority, primarily black.[2] In the five years prior to 1983, less than one percent—practically none—of the City's $124 million in construction contracts was awarded to minority-owned businesses.[3] An ordinance to address this problem was drafted, and in April 1983, the Rich-

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[1] *See Fullilove v. Klutznick*, 448 U.S. 448 (1980).

[2] Hearing on Adoption of Minority Business Utilization Plan, Richmond City Council 3 (1983) (hereinafter "Hearing Transcript"). The transcript of the City Council's public hearing is part of the record in this case. A copy has been lodged with the Clerk's office for the Court's convenience.

[3] Of the $124 million in city construction contracts, 0.67 percent was awarded to minority businesses during this period. *Id.* at 46, 49. *See also* App. G at 115.

mond City Council held a public hearing on this ordinance. It heard testimony and other evidence that racial discrimination had limited minority participation in Richmond's construction industry and effectively had excluded minority participation in city construction contracts. Witnesses spoke for and against the ordinance in a vigorous debate.[4]

In addition to evidence about the insignificant minority participation in Richmond's public construction contracts, the City Council heard evidence that the major construction trade associations in the City contained virtually no black members. The Associated General Contractors of Virginia had 600 members, including 130 in Richmond, but no blacks;[5] the American Subcontractors Association had 80 members in the Richmond area but no blacks;[6] the Richmond chapter of the Professional Contractors Estimators Association had 60 members but only one black;[7] the Central Virginia Electrical Contractors Association had 45 members but only one black;[8] and the Virginia Chapter of the National Electrical Contractors Association had 81 members but only two blacks.[9]

As the City Council knew, Congress had enacted a federal set-aside plan to remedy widespread racial discrimination that had limited minority participation in public contracting at the federal, state, and local level, and this federal plan had been held constitutional in *Fullilove*.[10] In addition, one member of the City Council,

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[4] *See* App. A at 16a (Sprouse, J., dissenting).

[5] Hearing transcript at 25-26.

[6] *Id.* at 39.

[7] *Id.* at 44.

[8] *Id.*

[9] *Id.* at 36-37.

[10] *Id.* at 8-9.

a former Mayor of Richmond, drew on his own experience with the Richmond construction industry in declaring, "without equivocation," that widespread racial discrimination in that industry had limited minority participation in Richmond's public construction contracts.[11]

At the end of the public hearing, the City Council enacted the Minority Business Utilization Plan.[12] The plan required contractors to whom the City awarded prime contracts to subcontract at least thirty percent of the dollar amount of the contract to minority business enterprises (MBEs), unless the prime contractor was itself an MBE or the City waived the requirement.[13] Waivers would be granted by the City on a showing that the contractor had attempted to comply with the plan's requirement but that "sufficient, relevant, qualified" MBEs were unavailable or unwilling to participate. App. G at 116-17. So that the plan would not outlive its limited remedial purpose, it was designed to expire by its own terms on June 30, 1988. App. H at 248.

B. The plan applied to Croson

Five months after the Richmond plan was enacted, the City invited bids for the installation of plumbing fixtures at the city jail. The J.A. Croson Company ("Croson"), which is not an MBE, was interested in bidding on the

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[11] *Id.* at 46 (remarks of Henry Marsh).

[12] Richmond, Va. Code ch. 24.1, art. I(F)(Part B) ¶ 27.10-27.20 (1983). The plan was actually enacted pursuant to two ordinances. *See* App. H.

[13] The plan defined an MBE as "[a] business at least fifty-one percent of which is owned and controlled, or fifty-one percent minority owned and operated, by minority group members . . . ." App. H at 251. "Minority group members" were defined as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos, or Aleuts." App. H at 252. Procedures promulgated pursuant to the plan required city officials to verify that an MBE was in fact minority-owned and controlled, so that "sham" MBEs did not benefit from the plan. App. E at 62.

contract and sought an MBE subcontractor to participate in the bid. On the day the bids were due, it contacted Continental Metal Hose ("Continental"), an MBE.[14] Though Continental was unable to state a firm price to Croson because it could not get an immediate commitment from its suppliers, it did indicate to Croson a desire to participate in Croson's bid. App. G at 122-23. Despite the lack of a firm commitment on price, Croson submitted a bid to the City, which was accepted. *Id.* at 123.

Shortly after the award, Croson requested a waiver of the MBE requirement on the ground that Continental had not quoted a firm price. The City refused to grant a waiver. App. G at 124-26. When Croson learned that Continental's firm price was higher than Croson had hoped, it again requested a waiver, or, alternatively, an increase in the contract price. Instead, the City elected to re-open the project for bids and invited Croson to submit a new bid. *Id.* at 126-28. Rather than submit a new bid, Croson brought this lawsuit.[15]

C. The proceedings below

Croson claimed that the Minority Business Utilization Plan violated the equal protection clause of the fourteenth amendment and Virginia state law, and it sought an injunction, declaratory relief, and damages. After a bench trial, the district court held for Richmond on all claims.[16]

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[14] There is dispute as to whether Croson had contacted Continental prior to that time. *See* App. G at 121-22.

[15] The suit was brought in Virginia state court and removed to the United States District Court for the Eastern District of Virginia.

[16] *J.A. Croson Company v. City of Richmond*, No. 84-0021-R (E.D. Va. Dec. 3, 1984) (App. G). Croson also raised federal statutory claims based on 42 U.S.C. §§ 1981 and 1983 and Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d. However, Croson agreed that these claims had no basis in the absence of a valid

After finding the Richmond plan permissible under Virginia law, the district court considered Croson's equal protection claim. App. G at 155. Since the appropriate standard for review of race-based remedial programs had been left unresolved by *Fullilove* and *Regents of the University of California v. Bakke*,[17] the district court relied on a three-part test synthesized from *Fullilove* and *Bakke* by the Eleventh Circuit:

> (1) that the governmental body have the authority to pass such legislation; (2) that adequate findings have been made to ensure that the governmental body is remedying the present effects of past discrimination rather than advancing one racial or ethnic group's interest over another; and (3) that the use of such classifications extend no further than the established need of remedying the effects of past discrimination.[18]

The district court determined that the Richmond plan satisfied all elements of this test.[19]

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equal protection claim, App. G at 222-23, and it did not raise them on appeal.

[17] 438 U.S. 265 (1978).

[18] App. G at 161-62 (quoting *South Florida Chapter of Associated General Contractors of America v. Metropolitan Dade County, Fla.*, 723 F.2d 846, 851-52 (11th Cir.), *cert. denied*, 469 U.S. 871 (1984) (emphasis omitted)).

[19] App. G at 162-209. In particular, the court found sufficient evidence to conclude racial discrimination was responsible for the virtual absence of minority participation in Richmond's public construction contracts. The court noted (1) the "enormous disparities" between the percentage of city construction contracts awarded to minority businesses and the percentage of minorities in the Richmond population; (2) prior findings of the United States Congress that low levels of minority business participation in public contracting reflect past discrimination; and (3) testimony at the City Council hearing that there was racial discrimination in Richmond's construction industry. The court rejected the argument that the low minority participation in public construction contracts reflected only the small number of minority contractors in Richmond, reason-

On appeal, the Fourth Circuit affirmed the district court's decision.[20] The Fourth Circuit found the district court had correctly applied a proper test in evaluating Croson's equal protection claim.

Croson sought certiorari from this Court, which granted the writ, summarily vacated the judgment, and remanded the case for consideration in light of *Wygant*.[21] On remand, and without briefing or argument concerning the impact of *Wygant*, the original panel of the Fourth Circuit reversed itself and found the Richmond plan unconstitutional, Judge Wilkinson writing for a divided court over a dissent from Judge Sprouse.[22]

Citing the plurality opinion in *Wygant*, the majority held that Richmond was obligated to show a "compelling interest" in its remedial plan, and that this required a showing that the City itself actively had discriminated against minority contractors. App. A at 5a, 8a. It considered the hearing testimony "nearly weightless," *id.* at 8a, and it found insignificant the fact that a city with a minority population of fifty percent awarded less than one percent of its public construction contracts to minority contractors. *Id.* at 7a. The majority concluded that the Richmond plan was a remedy for "societal discrimination" rather than discrimination by the City itself, and that it was therefore unconstitutional under

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ing that the small number of minority contractors in Richmond "suggests . . . that past discrimination has stymied minority entry into the construction industry in general, as well as participation in government construction contracting in particular." App. G at 163-68.

[20] *J.A. Croson Co. v. City of Richmond*, 779 F.2d 181 (4th Cir. 1985) (App. E).

[21] *J.A. Croson Co. v. City of Richmond*, 106 S. Ct. 3327 (1986) (App. D).

[22] *J.A. Croson Co. v. City of Richmond*, 822 F.2d 1355 (4th Cir. 1987) (App. A).

Wygant. *Id.* at 8a-9a. It also held, in the alternative, that the Richmond plan was not sufficiently "narrowly tailored" to meet its remedial goal. *Id.* at 11a.

The dissent argued that the majority "misconstrues and misapplies *Wygant*." App. A at 14a. Requiring a showing of active governmental discrimination against minority contractors, "might be fatally counterproductive to the concept of affirmative action," it stated, *id.* at 20a, and is in any event inappropriate "in areas where discrimination had effectively prohibited the entry of minorities into the contracting business, as in Richmond." *Id.* n.11. In the dissent's view, the City had sufficient evidence of past discrimination against minorities in its local construction industry, and the plan was sufficiently "narrowly tailored," to pass constitutional muster under *Wygant*. *Id.* at 15a.

The City then filed a petition for rehearing and suggestion for rehearing en banc. The Fourth Circuit denied the petition by a vote of six to five.[23]

THE QUESTIONS ARE SUBSTANTIAL

This case presents substantial and important issues, not yet resolved by this Court, concerning the circumstances under which a city may act to remedy racial discrimination in the city's construction industry that has prevented minorities from competing for city construction contracts. The Fourth Circuit, citing this Court's decision in *Wygant*, severely crippled the ability of cities effectively to remedy this discrimination. Other federal courts of appeal, also purporting to rely on *Wygant*, have reached similar results.[24] As a conse-

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[23] Order, *J.A. Croson Co. v. City of Richmond*, No. 85-1002(L), No. 85-1041 (4th Cir. Sept. 18, 1987) (App. B).

[24] *See Michigan Road Builders Association v. Milliken*, No. 86-1239 (6th Cir. Nov. 25, 1987); *Associated General Contractors*,

quence, programs instituted by many other state and local governments are directly endangered.[25] This is a matter of national importance and one that should not be left to unguided courts of appeal. This Court should resolve this matter after plenary review.

I. THE FOURTH CIRCUIT'S INTERPRETATION OF *WYGANT* THREATENS THE VIABILITY OF MINORITY CONTRACTING PROGRAMS ACROSS THE COUNTRY

The City of Richmond's Minority Business Utilization Plan represents one city's effort to deal with its share of a national problem in the only way that it reasonably could.

The United States Congress attempted to deal with the same problem when it enacted the "minority business enterprise" provision of the Public Works Employment Act of 1977.[26] Congress had found that racial discrimination in the construction and related industries had impaired the opportunities for minorities to participate in government contracting at the federal, state, and local level.[27] In *Fullilove*, this Court upheld the constitu-

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v. City and County of San Francisco, 813 F.2d 922 (9th Cir. 1987) (petition for rehearing pending); *J. Edinger & Son v. City of Louisville*, 802 F.2d 213 (6th Cir. 1986).

[25] The United States Conference of Mayors and the United States Department of Commerce recently studied cities with populations between 30,000 and 350,000 and determined that minority business assistance efforts were ongoing in 120 out of the 320 cities that had responded to questionnaires. United States Conference of Mayors and United States Department of Commerce, *1986 National City Profiles: Report on Minority Enterprise Development Programs* 1 (1986).

[26] 42 U.S.C. § 6705(f)(2) (1982).

[27] On a closely related issue, this Court has stated that "[j]udicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial

tionality of Congress' attempt to deal with the minority contractor problem. The Court found the federal plan justified by "abundant evidence . . . that minority businesses have been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." [28]

Like the federal government, state and local governments expend substantial resources each year on construction contracts. In response to the very problem identified and addressed by Congress, many state and local governments across the country have enacted assistance programs for minority contractors.

In enacting its plan, Richmond was responding to dramatic evidence that minority businesses had been virtually excluded from participation in the City's construction contracts as a direct result of discrimination in Richmond's construction industry. The disparity between the percentage of city construction business going to minorities in Richmond—less than one percent—and the percentage of minorities in Richmond—fifty percent—was so clearly probative that by itself it strongly indicates that discrimination had been at work.[29] In combi-

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notice." *United Steelworkers of America v. Weber*, 443 U.S. 193, 198 n.1 (1979).

[28] *Fullilove*, 448 U.S. at 477-78 (plurality opinion).

[29] Richmond had confronted in its recent past the need to break down racial barriers in various other segments of its society and in the city government itself. *See, e.g., City of Richmond v. United States*, 422 U.S. 358 (1975) (concerning the City's annexation plan and its compliance with the Voting Rights Act); *Bradley v. School Board*, 462 F.2d 1058, 1065 (4th Cir. 1972) (en banc) (school desegregation case, finding that "within the city of Richmond there has been state . . . action tending to perpetuate apartheid of the races"), *aff'd by an equally divided Court*, 412 U.S. 92 (1973) (per curiam). "No race-conscious provision that purports to serve a remedial purpose can be fairly assessed in a vacuum." *Wygant*, 106 S. Ct. at 1858 (Marshall, J., dissenting).

nation with Congress' findings of a long history of racial discrimination in state and local construction contracting,[30] and the other evidence adduced at its public hearing,[31] the City had a firm basis to believe that racial discrimination effectively had shut minorities out of Richmond's construction industry, and thus out of its public construction contracts.

The City had been a passive participant in the discrimination that had erected a remarkably effective barrier to minority participation in its construction contracts. For years it had perpetuated the effects of that discrimination by continuing to award valuable city contracts to a pool of contractors from which minorities had been virtually excluded. In 1983, Richmond decided to discontinue that role. Instead it began to create opportunities for minority entrepreneurs that previously had been denied to them because of racial discrimination. The City's actions were responsible and reasonable.

After *Fullilove*, efforts like those of Richmond here were upheld by each of the three federal appeals courts in which they were challenged.[32] Since the Court decided *Wygant*, however, the three federal courts of appeal that have considered the constitutionality of state or local

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[30] *See Fullilove*, 448 U.S. at 478. The Fourth Circuit dismissed the importance of Congress' findings, stating that "[n]ational findings do not alone establish the need for action in a particular locality." App. A at 9a. However, the City was entitled to rely on Congress' findings as long as it reasonably believed them to be relevant to the problem that it was addressing. *See City of Renton v. Playtime Theatres*, 475 U.S. 41, 50-52 (1986).

[31] *See supra* pages 4-5.

[32] *See South Florida Chapter of Associated General Contractors of America v. Metropolitan Dade County, Fla.*, 723 F.2d 846 (11th Cir.), *cert. denied*, 469 U.S. 871 (1984); *Ohio Contractors Association v. Keip*, 713 F.2d 167 (6th Cir. 1983); *Schmidt v. Oakland Unified School District*, 662 F.2d 550 (9th Cir. 1981), *vacated on other grounds*, 457 U.S. 594 (1982).

minority contracting programs have struck them down.[33] The Fourth Circuit's reversal of its own position in this case exemplifies this turnaround.

Moreover, the manner in which the lower courts are interpreting *Wygant* does not, as a practical matter, permit a state or local government to demonstrate any "compelling interest" in a minority contracting program. The approach of the Fourth Circuit here illustrates this point. The Fourth Circuit, relying on *Wygant*, concluded that Richmond did not have a "compelling interest" in its remedial plan because there was insufficient evidence that the City itself had engaged in the discrimination that it sought to remedy. App. A at 8a-9a. Even assuming the "compelling interest" standard is appropriate,[34] the Fourth Circuit's interpretation of *Wygant* makes unreasonable demands on a state or local government that wishes to remedy past discrimination by providing equal opportunities to minority members of its business community.

To require a government to admit or concede its own discrimination obviously would undermine its incentives to take remedial action.[35] Moreover, since longstand-

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[33] *See supra* note 24.

[34] Members of this Court variously have stated that the government's interest in its remedial program must be "important" or "compelling" if it is to survive scrutiny under the equal protection clause. *See United States v. Paradise*, 107 S. Ct. 1053, 1064 n.17 (1987).

[35] *See Wygant*, 106 S. Ct. at 1855 (O'Connor, J., concurring in part and concurring in judgment). The City Council in fact was very concerned that its enactment of a remedial plan not be construed as an admission of liability for past discrimination. When one Council member expressed concern that characterizing the plan as "remedial" might give rise to liability, the City's attorney responded:

> In the term remedial, we're not just implying that the City was intentionally discriminatory in the past. What we're say-

ing race-based barriers to entry have prevented minorities from even competing for government contracts,[36] proving active governmental discrimination in the public contracting setting usually will be futile and beside the point.[37] The Fourth Circuit stated that the appropriate way to prove past discrimination is through a comparison of "the number of minority contracts and the number of minority *contractors*, taking into account other relevant variables such as experience and specialities."[38] This test is impossible to satisfy where, as in this case, discrimination has prevented minorities from participating significantly in the pool from which contractors would be drawn. The Fourth Circuit's approach will serve only to perpetuate discrimination that has been so effective as to deny minorities even the opportunity to compete for government contracts.

> ing is that there are statistics about the number of minorities which were awarded contracts in the past which would justify the remedial aspects of the legislation. We're not saying there was intentional discrimination in any particular case.

Hearing Transcript at 8.

[36] *See Fullilove*, 448 U.S. at 478.

[37] In *Fullilove*, the minority set-aside plan was held constitutional on evidence showing that government had been in effect a passive participant in "the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or other unlawful conduct." *Fullilove*, 448 U.S. at 478.

[38] App. A at 7a (emphasis in original). It also rejected the City's use of general population statistics as "exactly the kind of evidence that will not pass muster," *id.*, reasoning that a "similar comparison" had been rejected by the plurality in *Wygant*. *Id.* It failed to appreciate that the comparison at issue in *Wygant* was rejected only because it was not probative of the issue of discrimination. As Justice Powell explained in *Wygant*, "[t]here are numerous explanations for a disparity between the percentage of minority students and the percentage of minority faculty, many of them completely unrelated to discrimination of any kind." *Wygant*, 106 S. Ct. at 1848 (plurality opinion).

II. THE FOURTH CIRCUIT'S CONSTITUTIONAL ANALYSIS OF THE RICHMOND PLAN WAS MORE STRINGENT THAN *WYGANT* REQUIRES

The Fourth Circuit's constitutional analysis of the Richmond plan was far more stringent than anything contemplated by this Court in *Wygant* or any other decision. *Wygant* involved issues very different from those presented in this case.[39]

Whether Richmond's plan is supported by a compelling or important interest—the critical question in this case—turns on issues not resolved by *Wygant*. In *Wygant*, the court of appeals had upheld a race-conscious layoff provision on the theory that a school board had an interest in providing minority role models for its minority students in order to alleviate the effects of societal discrimination. A plurality of this Court rejected the court of appeals' approach, reasoning that:

> [s]ocietal discrimination, without more, is too amorphous a basis for imposing a racially classified remedy. . . . No one doubts that there has been serious racial discrimination in this country. But as the basis for imposing discriminatory *legal* remedies

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[39] There obviously is strong disagreement about the meaning of *Wygant* and its application to the government contracting setting. In this case, not only was there a vigorous dissent from Judge Sprouse, but five of the eleven judges of the Fourth Circuit voted for a rehearing en banc. In *Michigan Road Builders Association v. Milliken*, No. 86-1239 (6th Cir. Nov. 25, 1987) in which the majority relied on both *Wygant* and the instant case in declaring a Michigan minority contractor set aside program unconstitutional, the dissent's opening remark was: "The majority reads *Wygant v. Jackson Board of Education*, 476 U.S. 267 (1986), as if it changed all the previously accepted standards for judging the validity of affirmative action programs of governments and governmental units. That is not a fair appraisal of the purport or effect of *Wygant*." Slip op. at 28.

> that work against innocent people, societal discrimination is insufficient and over expansive.[40]

The plurality also indicated that this Court had in the past "insisted upon some showing of prior discrimination by the governmental unit involved." [41]

However, because this Court found the layoff provision to be unconstitutional in any event, it never explored the question of what constitutes "societal discrimination," [42] or whether governmental participation in prior discrimination is required in all cases to support a voluntary affirmative action program,[43] or, where governmental participation is required, the kind or degree of participation required. Moreover, this Court did not consider "governmental interest" issues in the public contracting context at all. Indeed, as Justice O'Connor pointed out in her concurring opinion:

> [C]ertainly nothing the Court has said today necessarily forecloses the possibility that the Court will find other governmental interests which have been relied upon in the lower courts but which have not been passed on here to be sufficiently 'important' or

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[40] *Wygant*, 106 S. Ct. at 1848 (emphasis in original).

[41] *Id.* at 1847.

[42] Justice O'Connor did indicate that "societal discrimination" is "discrimination not traceable to [a governmental agency's] own actions." *Wygant*, 106 S. Ct. at 1854. (O'Connor, J., concurring in part and concurring in judgment).

[43] A showing of prior governmental discrimination is not necessary where a voluntary affirmative action program is challenged under Title VII of the Civil Rights Act of 1964. *See Johnson v. Transportation Agency, Santa Clara County*, 107 S. Ct. 1442, 1451 (1987). It is sufficient for the employer to show a "conspicuous . . . imbalance in traditionally segregated job categories." *Id.* (quoting *United Steelworkers of America v. Weber*, 443 U.S. 193, 209 (1979) (Blackmun, J., concurring)).

> 'compelling' to sustain the use of affirmative action policies.[44]

The Fourth Circuit thus erred in concluding that *Wygant* required Richmond to show that the City itself actively had discriminated against minority contractors.

Wygant held that "societal discrimination, without more" will not support a government's use of race-conscious measures.[45] This requirement is met here whether or not the City actively discriminated against minorities in the awarding of city construction contracts. The City Council was not attempting to remedy the effects of "societal discrimination," but rather was addressing a specific problem that concerned the conduct of city business and that it determined to be a direct result of racial discrimination in a local industry, the effects of which the City was perpetuating. As Judge Sprouse stated in his dissent from the Fourth Circuit opinion:

> [T]here was no suggestion before the Council that the Richmond business community needed a 'role model' in the form of highly visible minority contractors performing public work, or even that the minimal presence of minority contractors in that endeavor was caused by such 'societal' discrimina-

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[44] *Wygant*, 106 S. Ct. at 1853. (O'Connor, J., concurring in part and concurring in judgment). *See also id.* at 1867 (Stevens, J., dissenting) (layoff provision justified by school board's interest in employing minority teachers regardless of whether school board itself was guilty of racial discrimination); Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 Harv. L. Rev. 78 (1986) (arguing that voluntary affirmative action plans may be justified by a variety of goals other than remedying the past discrimination of the entity adopting the plan).

[45] *See Wygant*, 106 S. Ct. at 1848 (plurality opinion). As Justice Powell stated in *Wygant*, if a remedial plan were designed to correct societal discrimination, "a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future." *Id.*

> tory factors as past inferior education or lack of access to social institutions.

App. A at 21a-22a. The governmental interest here is fundamentally different from that found insufficient to support the remedial plan in *Wygant*.

The Fourth Circuit also misapplied *Wygant* in holding that the Richmond plan was not sufficiently "narrowly tailored" to meet its remedial goal.[46] Its primary argument was that "[t]he thirty percent quota was chosen arbitrarily; it was not tied, for example, to a showing that thirty percent of Richmond subcontractors are minority-owned." App. A at 11a. To a large extent, this position flows from the court's erroneous view of the "compelling interest" issue. As discussed *infra* at 14, the Fourth Circuit failed to recognize that tying a minority subcontracting requirement to the percentage of local minority-owned contractors is inappropriate where that percentage is low as a result of discrimination. Moreover, its assertion that the thirty percent figure is arbitrary is unfair. As this Court has recognized, arriving at such a figure "necessarily involve[d] a degree of approximation and imprecision."[47] In view of the virtual absence of minority participation in city contracts in a city fifty percent minority, the thirty percent figure is reasonable.

The reasonableness of the Richmond plan is strengthened by the fact that it contains waiver provisions and an expiration date, both of which this Court has recognized narrow the scope of an affirmative action plan's

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[46] It is clear that a government must use appropriate means to achieve its remedial goals. The "narrowly tailored" standard is one of several standards enunciated by members of this Court at various times, and arguably the strictest. *See United States v. Paradise*, 107 S. Ct. 1053, 1064 n.17 (1987). Even assuming it is the governing standard, it is satisfied in this case.

[47] *United States v. Paradise*, 107 S. Ct. at 1072 (quoting *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 372 (1977)).

operation and minimize its impact on non-minorities.[48] The Fourth Circuit nevertheless found the waiver provisions too "restrictive" because a waiver may be granted "only in exceptional circumstances" (precisely the same language approved in *Fullilove*) and as a matter of administrative discretion, and because the burden of obtaining the waiver is on the contractor seeking it. App. A at 12a-13a. These are truly surprising criticisms, since not only are the waiver provisions modeled after those approved by this Court in *Fullilove*, but they contain standard terms one would expect to find in any waiver provision. Similarly, the Fourth Circuit gave no weight to the Richmond plan's expiration date, on the ground it does not preclude the City from renewing the plan. *Id.* at 12a. This, of course, is true of any expiration date. Given the nature of these criticisms, it is apparent that the Fourth Circuit's interpretation of the "narrowly tailored" requirement is far more stringent than anything contemplated by this Court, and should not be left standing.

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[48] *United States v. Paradise*, 107 S. Ct. at 1067; *Fullilove*, 448 U.S. at 510-11 (Powell, J., concurring).

CONCLUSION

For the foregoing reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

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